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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TELESOCIAL, INC.,

Plaintiff.

V.

ORANGE S.A., et al..

Defendants.

Case No. 3:14-cv-03985-JD

**DEFENDANTS' NOTICE OF MOTION
AND MOTION *IN LIMINE* NO. 1 TO
PRECLUDE PLAINTIFF FROM
CHARACTERIZING A JULY 2012
PRESENTATION TO FACEBOOK AS
IMPROPER**

Final Pretrial Conference: March 23, 2017
Ctrm: 11, 19th Floor
Judge: Honorable James Donato
Trial: April 10, 2017

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, at a time and date set by the Court, Defendants Orange S.A. and all individual defendants (collectively, the “Orange Defendants”) will and hereby do move *in limine* pursuant to Federal Rule of Civil Procedure 16(b) and Federal Rules of Evidence 401, 403, and 404 to preclude Plaintiff Telesocial (“Telesocial”) from presenting evidence or argument characterizing the inclusion of a Telesocial screenshot in a July 2012 Orange presentation to Facebook as improper in any way.¹ This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities included herewith, the supporting Declaration of Anthony Mirenda, all pleadings and papers on file in this action, and such further evidence, argument, and exhibits that may be submitted to the Court at or before the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

In its order on the Orange Defendants’ motion to dismiss, this Court held that the Orange Defendants’ *forum non conveniens* argument did not apply because Telesocial’s claims in the First Amended Complaint did “not fall within the scope of the forum selection clause.” (Docket No. 85 at 4). Notably, the forum selection clause that was included in the Non-Disclosure Agreement (the “NDA”) would have sited this dispute in France. Analyzing each of Telesocial’s claims, and relying on Telesocial’s express representations, the Court concluded that each claim concerned only conduct *after* the termination of the NDA.² See, e.g., *id.* at 5 (“As the facts alleged in the FAC make clear, this claim [under the CFAA] is premised entirely upon events that occur after the abrupt termination of the discussions subject to the NDA.”) Despite the clear import of the Court’s order that Telesocial’s claims apply only to conduct *after* the termination of the NDA, Telesocial has nonetheless, throughout discovery, hearkened back to conduct *during* the period

¹ The presentation is included as Exhibit 1 to the supporting affidavit of Anthony Mirenda (“Mirenda Decl.”), filed herewith.

² It is Telesocial's position that the NDA terminated with the end of negotiations in July 2012. It is Orange's position that the NDA did not terminate then and in fact continued beyond the fall of 2012, covering Orange's conduct in that time period as well. Nothing herein shall be taken as a waiver of Orange's arguments concerning the termination of the NDA, and instead Orange expressly preserves them.

1 governed by the NDA. In particular, Telesocial has characterized Orange's inclusion of a
2 screenshot of Telesocial's Call Friends application in a July 2012 presentation to Facebook as
3 being some illicit taking and misuse of Telesocial's confidential information shared during the
4 period of the parties' negotiations—exactly the subject-matter covered by the NDA. *See, e.g.*,
5 Exhibit 2 to Mirenda Decl. (Catherine Le Drogo Tr. 202-222) (Telesocial's counsel asking, at
6 208:2-4, "And again, we see a screenshot provided on this page, which was pulled—which is a
7 Telesocial screenshot, right?" and later, at 216:11-12, "Where does the word 'Telesocial' appear
8 on page 6053?"). This has occurred with no fewer than three Orange witnesses at deposition.

9 Given the Court's ruling on the motion to dismiss, and Telesocial's affirmative arguments
10 to the Court that the allegations in its First Amended Complaint pertained only to the period after
11 the termination of the NDA, Telesocial should be estopped from arguing alleged improper conduct
12 that reaches-back to the period before the NDA's termination.

13 The Orange Defendants anticipate that Telesocial will seek to characterize the presentation
14 to Facebook, specifically a Telesocial screenshot in it, as improper and ill-gotten. This
15 characterization is irrelevant to the claims in dispute, and Telesocial should be precluded from
16 suggesting in any way that Orange inappropriately gained access to or misused information during
17 the parties' negotiations. If Telesocial is allowed to characterize Orange's presentation to
18 Facebook in this manner, there will be substantial prejudice to Orange, confusion of the issues that
19 are appropriate for the jury's consideration, and a time-intensive mini trial on a subject – whether
20 or not Orange's use of this screenshot in July 2012 was permissible under the NDA – this Court
21 has already found is outside the claims alleged by Telesocial.

22 Orange would be unduly prejudiced by any suggestion of impropriety under the NDA,
23 including the content of the presentation to Facebook. Fed. R. Evid. 403, *see United States v.*
24 *Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 2005) ("[U]nfair prejudice in the context of balancing
25 evidence means an undue tendency to suggest decision on an improper basis commonly, though
26 not necessarily, an emotional one."). Knowing it cannot litigate the issue of a supposed violation
27 of the NDA directly, Telesocial must be precluded from injecting the issue indirectly, implanting

1 the subject firmly in the minds of the jurors, who, despite having no claim under the NDA before
2 them, will have heard the suggestion, often coded and subtle, that Orange gained access to
3 information that was protected or confidential during the period of the parties' negotiations and
4 then misused it. This is exactly the proscription of Rule 404, in that Telesocial suggests that
5 Orange's use of this document during the negotiations was somehow improper and is now relevant
6 to whether Orange engaged in misconduct after the negotiations ended. Fed. R. Evid. 404(b)(1).

7 Exclusion is also warranted where there is "danger of confusing the issues and wasting
8 time with mini-trials regarding the events underlying" entirely different claims than those alleged
9 at trial. *United States v. Jones*, 123 F. App'x 773, 775 (9th Cir. 2005). Telesocial has no claims
10 under the NDA, and yet its improper characterization of conduct during the period of the NDA
11 would significantly complicate the jurors' decision-making by introducing another potential legal
12 framework that this Court has already determined does not apply to the issues in this case. If
13 alleged misconduct under the NDA crept into testimony at trial, then Orange would be forced
14 to introduce evidence at trial that there was no breach under the NDA—a 'mini trial' on an issue
15 that has already been put to rest. "These 'mini-trials' pose the risk of unfair prejudice, are likely
16 to confuse the issues, mislead the jury, and waste time." *Thuy Van v. Language Line Servs.*, No.
17 14-3791, 2016 U.S. Dist. LEXIS 85620, at *8-9 (N.D. Cal. June 30, 2016). Ultimately, Telesocial
18 should not be allowed to go through the back door when the front door has been closed. The Court
19 determined, based on arguments made by Telesocial and amendments to its complaint that
20 removed all reference to the NDA, that Telesocial's claims pertained only to conduct after the
21 termination of the NDA. It cannot now seek to reintroduce this same conduct by implication,
22 suggestion, or characterization.

23 **CONCLUSION**

24 For all the foregoing reasons, the Orange Defendants respectfully request that the Court
25 grant this Motion and preclude Telesocial from characterizing the inclusion of a Telesocial
26 screenshot in Orange's presentation to Facebook as improper in any way.

Respectfully submitted,

ORANGE, S.A., et al.

By their attorneys,

Daniel Schimmel (*pro hac vice*)
Anthony Mirenda (*pro hac vice*)

/s/ Anthony D. Mirenda

Anthony D. Mirenda

FOLEY HOAG LLP

Dated: February 23, 2017

FILER'S ATTESTATION

Pursuant to Civil L.R. 5-1(i)(3), regarding signatures, I, Daralyn J. Durie, attest that concurrence in the filing of this document has been obtained.

/s/ Daralyn J. Durie

Daralyn J. Durie